In the Supreme Court
OF THE
United States

OCTOBER TERM, 1944

No.

LOUIS BURALL,
Petitioner,

vs.

JAMES A. JOHNSTON, Warden, United States Penitentiary, Alcatraz, California,
Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

THE JURISDICTIONAL QUESTION.

There would not appear to be much merit in the Circuit Court's assumption that non-compliance with Rule 1 "would make it difficult" for a District Court to perform its functions "if numerous petitions were addressed to one judge of the court". Since June, 1934, approximately 275 petitions have been filed in

the District Court here by prisoners confined to Alcatraz. The yearly average of about 28 petitions means that each of the four district judges here passes upon 7 such petitions per year under Rule 1. Were each of these petitions to be addressed to a specific judge in lieu of the Court the mathematical law of averages, expressed in petitioners' choice, would bring 7 petitions before each per year although the names of the applicants in a given number of cases would be different from those which might have resulted had Rule 1 been applied to all the petitions. Were the 28 to be addressed and presented to one judge at one time it ought not to take in excess of 2 days for him to take the initial judicial action thereon required by 28 U. S. C. A., Sec. 455. It is not unusual for a judge of the District Court here to handle 28 matters on a single law and motion calendar at one sitting. A petition for the writ requires an expenditure of no more effort and time than does passage upon a demurrer.

However irksome it may be it is no great burden for a petitioned judge to read a petition and, if it be found hopelessly defective on its face, to deny the application or, if it presents only doubtful issues of law or fact, to issue a rule (order) to show cause why the writ should not issue thereon and test such issues as on demurrer, a practice recognized in *Ex parte Yarbrough,* 110 U. S. 651. If convinced the petition states grounds or might do so if its defects appear curable by additional pleadings he issues the writ, returnable at a specified time. The petitioner

may be bailed pending a final decision on the merits. Thereupon the respondent files a return form to the writ "certifying * * * the cause of the detention" (28 U. S. C. A., Sec. 457) and the petitioner a traverse (§ 460) thereto. The bailed petitioner thereafter appearing, or the respondent producing the body of the unbailed petitioner in Court, and the Court then having custody of his body pursuant to the command of the writ, the summary hearing on the merits under § 461 is had to determine whether the petitioner be discharged from unlawful restraint or be remanded to his jailor. The question whether the actual hearing on the merits may be transferred by a petitioned judge to the Court or to another judge after the writ has been issued presents a question not involved in this case.

The Circuit Court's panel opinion herein stresses the importance of the jurisdiction question yet does not cite any authorities or mention 28 U. S. C. A., Sec. 455, much less construe its mandate for summary judicial action of the judge addressed.

Instead it adopts a district judge's opinion in *Wright v. Johnston,* 49 F. Supp. 748, 749, and sustains the refusal of Judge Roche to act on the petition and his attempt to transfer his jurisdiction on the same ground of convenience condemned in *Holiday v. Johnston,* 313 U. S. 342. The District Court's opinion and the Circuit Court's casual opinion do not mention *Holiday v. Johnston,* much less attempt to distinguish it.

The adopted District Court opinion, while setting forth § 455, nowhere construes its terms. Instead it refers to § 452[4] giving the petitioner the choice of eight Supreme Court justices, seven Circuit judges, four District judges and the District Court. Of that section the adopted opinion says (p. 749):

> "It is true that under 28 U. S. C. A. § 452, the several Judges of this court are empowered to grant writs of habeas corpus. *It does not follow, however, that it is mandatory upon the judge, to whom a petition for writ of habeas corpus is addressed, to pass upon such petition;* * * *"

Obviously it does not follow from § 452 that it is mandatory on the addressed judge to act summarily or otherwise on the application to him as judge. But casually to say the same of the words of § 455, that the judge chosen of the nineteen "to whom such application is made shall forthwith grant the writ," if properly applied for, is no more than disposing of this admittedly important question by stating "It is not so."

The opinion of the Circuit Court, in adopting that in *Wright v. Johnston,* supra, holds that a petitioner to *a judge* for a writ of habeas corpus has no more right to choose his judge than an ordinary civil liti-

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[4] "§ 452. Power of judges; place of entering order of Circuit judge. The several justices [8] of the Supreme Court and the several judges of the Circuit Courts of Appeal [here 7] and of the District Courts [here 4], within their respective jurisdictions, shall have power to grant writs of habeas corpus for the purpose of an inquiry into the cause of restraint of liberty * * *".

gant filing his complaint *in the Court.*[5] The obvious answer is that Congress in § 452, supra, has given such a petitioner in the Northern District of California the choice of nineteen justices and judges.

It is true that in the summary action of the district judge he has a *discretion* to issue an order to show cause why the writ should not issue and that such procedure satisfied the requirement of the word "forthwith," as held in *Walker v. Johnston,* 312 U. S. 275, 284. However, nothing in the reasoning of that case warrants the district judge to whom the petition is addressed to *refuse to take any judicial action at all.*

The adopted district court opinion in support of Judge Roche's refusal to act and the substituted rotative rule of the Court action instead of action by the addressed judge, states at page 750 that "The propriety of such action was recognized in *Ex parte Clarke,* 100 U. S. 399, 403, * * * See, also, *In re Fitton,* C. C., 45 F. 471."

In adopting these authorities the Circuit Court failed to note much less comment that in each of these

[5]An application for the writ addressed and presented to a Court, as distinguished from one addressed and presented to a single justice or judge, is to be construed as one signifying an intention upon the part of the applicant that it be considered by any justice or judge thereof to whom it may be assigned by the clerk of that Court pursuant to a rule of Court convenience, its practice or custom. There is no such election when it is addressed and presented to a personally selected justice or judge whose personal original jurisdiction, lodged by § 452, is invoked under § 454 and whose duty it is under § 455 to take immediate judicial action thereon. There is no authority lodged by Congress in a personally selected justice or judge to refuse jurisdiction or to shift or to delegate it, the mandate of § 455 requiring him to take action thereon himself.

cases a judge addressed *awarded the writ.* In *Ex parte Clarke* the petition was addressed to all "the Judges of the Supreme Court." One of them ordered the Supreme Court to issue the writ making it returnable to him. The prisoner was brought before him, taken from the jailor and admitted to bail. The justice then ordered the case heard by the Supreme Court, that is before all the judges to whom the petition was addressed. Thereafter came the more deliberative process of considering the merits. The question here is not whether this is proper procedure, after the writ is awarded by the judge and issued by the Court. What is here concerned is the initial action of the judge under § 455, by which the imprisoned man is taken out of the custody of the jailor or kidnaper and into the custody of the judge or Court.

Nothing in these two cases warrants a judge's refusal to take any action on the petition. On the contrary, the Supreme Court in *Ex parte Clarke* (p. 403) states of the judicial action *after* the justice awarded the writ and the jailor made his return and produced petitioner's body, "Of course, under our system, no justice will needlessly refer a case to the court when he can decide it satisfactorily to himself, and will not do so in any case in which injury will be thereby incurred by the petitioner. No injury can be complained of in this case, since the petitioner (after he was produced on the awarded writ) was allowed to go at large on reasonable bail."

Nevertheless, in reliance on this case, the Circuit Court's opinion says the addressed judge may refuse to act on the petition and instead file it in the Court,

in which it is not entitled, and have the petition acted upon by a different judge emerging from the hopper of the rotation rule!

The adopted District Court opinion cites cases in which Circuit judges have refused to act because of interference with their appellate functions. Whether or not the difference in functions warrants the refusal of a Circuit judge to act judicially on the writ has not been decided by the Supreme Court, but the reasoning in these cases affords no ground for the refusal to act by the District judge. All are based on the theory that the petitioned District judge must act on such a petition.[6]

To the statement of the three-judge panel's opinion that the judge to whom the petition is addressed may die and hence is entitled to ignore the command that he "*shall* forthwith award the writ," it seems apparent that if he be dead he cannot transfer the jurisdiction to another judge.

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[6]In *United States v. Hill*, 71 F. 2d 159 (CCA-3), the Court states "28 U.S.C.A. § 452 confers power upon the judges of the Circuit Court of Appeals to grant writs of habeas corpus. This does not mean, however, that a judge of the Circuit Court of Appeals is bound to entertain such application when it might have been made to a judge of the appropriate District Court. In the instant case there were no circumstances alleged which would make it necessary for a judge of the Circuit Court of Appeals to allow the writ, since the appellant might have applied to either of two District Judges within the Middle District of Pennsylvania, where the appellant is confined. Neither is there an allegation in the petition that an application had been made to either of these judges. A refusal by Judge Woolley to take jurisdiction did not deprive the appellant from making an application to a judge of that district * * *" See also, relying on *United States v. Hill*, *O'Brien v. Swope*, reported in 102 F. 2d 471 and *Sweetney v. Johnston*, reported in 121 F. 2d 445, through opinions of a Circuit judge acting singly.

The opinion of the three-judge panel, in further justification of a transfer of the jurisdiction from the addressed judge to another judge, states that "The application of this rule (Rule 1 of District Court, supra), could work no injustice on petitioners for the reason that any petitioner who is dissatisfied with the decision of the District Court has recourse to the right of appeal, which has never been denied him if made in good faith."

That is to say, *the right of appeal from a Court lacking jurisdiction confers that jurisdiction.* This obvious *non sequitur* further shows the casual consideration of this important question, here presented for the first time to any Appellate Court.

The opinion of the three-judge panel also states that it may not be "necessary" to decide whether the petitioned judge may refuse to act upon the petition and by the District Court Rule 1 transfer his jurisdiction to another judge or, as here, to a Court. It is obvious that the Circuit Court, *sua sponte,* was required to determine such a jurisdictional question, whether raised by the parties or not. Here the jurisdictional question was raised by the parties and in the Court's opinion, as in the question stated by the Circuit Court, supra.

II.

THE DENIAL OF COUNSEL QUESTION.

A U. S. Commissioner is an adjunct of the Court, possessing independent, though subordinate powers of his own. (*Grin v. Shine,* 187 U. S. 181, 187.) The

preliminary hearing before him is a judicial hearing and an integral and important part of the *criminal prosecution* mentioned in the Sixth Amendment. If he finds, upon examination of both sides, a want of probable cause justifying the complaint against an accused he is empowered to dismiss the prosecution that has been commenced. If he finds probable cause exists he is empowered to lend impetus to the prosecution. He is, in fact, an examining and committing magistrate whom the Congress has authorized the District Courts to appoint, the power of appointment being permissive and not mandatory. (28 U. S. C. A., Sec. 526.) Upon acceptance of office he performs the specific statutory judicial duties which the Courts must perform if he refuses to act.[7] The Courts may and, if a commissioner be not appointed or refuses to act, must perform the limited magisterial duties required of him as incidents to their regular judicial duties. Without congressional authorization the Courts would not be empowered to delegate any part of their judicial functions to commissioners, as held in *Holiday v. Johnston,* supra, and of necessity would perform those functions themselves.

The right to be represented by counsel would be of little significance if the denial thereof did not operate to deprive the Court wherein the cause was pending of jurisdiction to proceed whether the deprival was occasioned by a commissioner or a judge. It is of little importance whatever if it may be taken away

[7]These powers are set forth in: 28 U. S. C. A., Secs. 526, 529, 530, 758, 18 U. S. C. A., Secs. 591, 594, 596, 611, 614, 615, 627, and 8 U. S. C. A., Secs. 45, 49 and 50.

at one stage of a criminal prosecution and restored at another. It might as well be dispensed with entirely. If a district judge is precluded from depriving an accused of counsel during the progress of a criminal prosecution, a commissioner, acting at the preliminary hearing stage of the prosecution as a substitute for the judge, likewise is precluded from depriving an accused of his right to counsel.[8] The violation, being enjoined by the Constitution, is one of a jurisdictional nature causing the Court to lose jurisdiction to proceed until the defect is corrected. The right to representation is not a mere matter of grace or simple privilege—but a fundamental substantive right that extends to "every step in the proceedings". (*Johnson v. Zerbst,* 304 U. S. 458, 463, and *Powell v. Alabama,* 287 U. S. 45, 68, 69. Also com-

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[8]The criminal prosecution of the petitioner took place in Illinois. (R. 4.) Under 18 U. S. C. A., Sec. 591, a commissioner performs the magisterial duties of an examining or committing magistrate, the same powers being lodged in him as in a district judge, state judge or justice of the peace. The commissioner who is alleged in the petition for a writ of habeas corpus involved herein to have conducted petitioner's preliminary hearing, exercised the magisterial powers which a judge or justice of the peace in Illinois was authorized to exercise. See Illinois Criminal Code, Ch. 38, Secs. 687, 688, 697, 698, 703 and 706. There being no federal statute expressly requiring a commissioner to notify an accused of his right to counsel or authorizing him to deprive an accused of such representation the law of Illinois is automatically invoked and becomes applicable under 28 U. S. C. A., Sec. 725. It is significant that its Criminal Code, Ch. 38, Sec. 754, provides, "Every person charged with crime shall be allowed counsel, and when he shall state upon oath that he is unable to procure counsel, the Court shall assign him competent counsel, who shall conduct his defense. In all cases counsel shall have access to persons confined, and shall have the right to see and consult such persons in private." The 6th Amendment also appears to guarantee the right to counsel from the time an accused is charged with crime.

pare *Pierre v. Louisiana,* 306 U. S. 354.) If violated with impunity it would lose its organic character, ceasing to be a rule of substantive constitutional law and becoming converted into a mere rule of adjective law which might be ignored or be presumed to be waived. This Court has declared, however, that the Courts must "indulge every reasonable presumption against waiver" of fundamental constitutional rights. (*Aetna Insurance Co. v. Kennedy,* 301 U. S. 389, 393.) It has also declared that they "do not presume acquiescence in the loss of fundamental rights". (*Ohio Bell Telephone Co. v. Public Utilities Commission,* 301 U. S. 292, 297, and *Johnson v. Zerbst,* supra.) If a commissioner may deprive an accused of the services of counsel he can act as a Star Chamber, can exact confessions and declarations against the interest of an accused, by unlawful methods, and these could be used against the accused at the trial.

In *U. S. v. Bollman,* Fed. Cas. No. 14,622, which altered the earlier rule announced in *In re Bates* (1858, D.C.), Fed. Cas. No. 1099a, it was decided that an accused is entitled to the services of counsel at his preliminary hearing. (See, also, *Wood v. U. S.,* 128 Fed. (2d) 265, 271.) The great weight of authority in the several state jurisdictions is in accord. (See summaries and citations in 84 L. Ed. 390-396.) In *Avery v. Alabama,* 304 U. S. 444, this Court declared that the denial of "any representation of counsel at all" would invalidate the criminal prosecution. In *Anderson v. Treat,* 172 U. S. 24, the question whether a deprival of the right to counsel at a preliminary

hearing before the commissioner deprived the trial Court of jurisdiction over the cause and invalidated the proceedings from that point on was recognized as posing a substantial federal question but was not determined because the record disclosed the accused had waived that hearing. The precise question does not seem to have been passed upon by any appellate tribunal except the Circuit Court below in the unprecedented decision in the instant case.

The Sixth Amendment does not confine the right of an accused to be represented by counsel to the time of arraignment for plea before the Court and to the trial. It expressly guarantees the right in all criminal "prosecutions", a term seemingly embracing and intended to embrace every stage of the prosecution from the lodging of a complaint to the passage of sentence. The Court has jurisdiction over the cause and over the person of the accused from the moment a complaint is filed and the defendant is arrested and taken into custody. The right is not restricted to actual appearances by counsel in a courtroom but includes the accused's right to full representation and consultation at any and every moment, both within and outside the courtroom, from the time the complaint is lodged until sentence is passed and the prosecution is terminated. If the right includes such services at the preliminary hearing and also at times prior thereto during the progress of the criminal prosecution, as recognized in *Anderson v. Treat,* supra, it would seem that a deprivation of the right would deprive the Court of jurisdiction to proceed in the absence of

a deliberate waiver upon the part of the accused. The corrective method to restore to the Court the lost jurisdiction would be to vacate the proceeding and proceed anew with the prosecution from the point where the jurisdiction was lost. This may be accomplished by a direct attack upon the judgment by a motion to vacate instituted by the defendant or the Court, or by appeal or by collateral attack through the medium of an application for a writ of habeas corpus.

It is significant that cases in which a commissioner fails to inform an accused of his rights are rare—and cases wherein he denies an accused the right to be represented by counsel, as alleged in the petition presented to the district judge below, are even rarer. Rule 5b of the Federal Rules of Criminal Procedure which has been submitted by this Court to Congress for approval provides:

> "The commissioner shall inform the defendant of the complaint against him, of his right to retain counsel and of his right to have a preliminary examination. He shall also inform the defendant that he is not required to make a statement and that any statement made by him may be used against him. The commissioner shall allow the defendant reasonable time and opportunity to consult counsel and shall admit the defendant to bail as provided in these rules."

When the proposed rules are enacted into law we believe that commissioners will be able to ascertain their duties concerning the right of representation with greater ease than heretofore when they were

compelled to examine not only the Constitution, federal statutes and decisions, but also state law and the common law for light upon the subject. When the new rules become effective commissioners will be able to offer no excuses for violations of the rights of accused persons to counsel.

If the alleged deprivation of the petitioner's right to counsel at his preliminary hearing by the commissioner were to be declared as having no effect upon the validity of the judgment of conviction the safeguards of the Sixth and Fifth Amendments would lose much of their significance and the right to counsel would be destined, in the future, to be more honored in the breach than in the observance.

For the foregoing reasons we believe that a writ of certiorari directed to the Ninth Circuit Court of Appeals should be granted.

Dated, San Francisco, California,
April 23, 1945.

Respectfully submitted,
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